82-1405

In The

Supreme Court of the United States

OCTOBER TERM, 1982

No. _____

MARY CARRIONE
Petitioner

v.

STATE OF CONNECTICUT
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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February 18, 1983

A. QUESTIONS PRESENTED

I. THE DEFENDANT WAS DENIED HER RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND UNDER CONNECTICUT GENERAL STATUTES SECTION 54-84.

II. THE DEFENDANT WAS DENIED HER RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE ONE, SECTION SEVEN OF THE CONNECTICUT CONSTITUTION OF 1965 DUE TO PRE-ARREST DELAY.

III. THE DEFENDANT WAS DENIED HER RIGHTS TO DUE PROCESS AND TO A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THE STATE WAS ALLOWED TWO CLOSING ARGUMENTS TO THE JURY WHILE THE DEFENDANT WAS ALLOWED ONLY ONE.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

To the Honorable, the Chief Justice and Associates Justices of the Supreme Court of the United States.

Mary Carrione, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Connecticut entered in the above-entitled case on December 21, 1982.

B. LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

State of Connecticut, Plaintiff, and

Mary Carrione, Defendant and Petitioner.

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F. OPINION BELOW

The opinion of the Supreme Court of Connecticut is reported at 188 Conn. 681 (1982) and is printed in Appendix A hereto, infra.

G. JURISDICTION

The final judgment of the Connecticut Supreme Court, the State's highest court, was entered on December 21, 1982 at 10:00 A.M. (Appendix A, infra).

The jurisdiction of the Court is invoked under 28 United States Code Section 1257 (3).

H. CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

I. United States Constitution Amendment Four.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

II. United States Constitution Amendment Five.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval

forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

III. United States Constitution Amendment Fourteen.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IV. Connecticut Constitution of 1965, Article One, Section Seven

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

V. Connecticut General Statutes Section 53a-122

(a) A person is guilty of larceny in the first degree when:

(1) The property or service, regardless of its nature and value, is obtained by extortion, or

(2) the value of the property or service exceeds two thousand dollars.

(b) Larceny in the first degree is a class B felony.

VI. Connecticut General Statutes Section 54-84

(a) Any person on trial for crime shall be a competent witness, and at his or her option may testify or refuse to testify upon such trial. The neglect or refusal of an accused party to testify

shall not be commented upon by the court or prosecuting official, except as provided in subsection (b) of this section.

(b) Unless the accused requests otherwise, the court shall instruct the jury that they may draw no unfavorable inferences from the accused's failure to testify. In cases tried to the court, no unfavorable inferences shall be drawn by the court from the accused's silence.

VII. Connecticut Practice Book Section 874

Unless the judicial authority for cause permits otherwise, the parties shall proceed with the trial in the following order:

(1) The prosecuting authority shall present his case in chief.

(2) The defendant may present a case in chief.

(3) The prosecuting authority and the defendant may present rebuttal evidence in successive rebuttals, as required. The judicial authority for cause may permit a party to present evidence not of a rebuttal nature, and if the prosecuting authority is permitted to present further evidence in chief, the defendant may respond with further evidence in chief.

(4) The prosecuting authority shall be entitled to make the opening and final closing arguments.

(5) The defendant may make a single closing argument following the opening argument of the prosecuting authority.

I. STATEMENT OF FACTS

The Defendant, Mary Carrione, was convicted in the Connecticut Superior Court for Fairfield County of larceny in the first degree in violation of Connecticut General Statutes §53a-122. The larceny of which Mary Carrione was convicted involved an investment deal in which investors could put up $3,000.00 for a return of $1,000.00 in two months and 10 days. Some people did not get back their investment or their interest. The Defendant, a housewife, has always proclaimed her innocence and lost money as an investor in this investment deal herself. Another person ran this investment deal. Her mistake was allowing some of her friends to invest with that other person through her.

The charges complained of alleged criminal activity taking place between July of 1975 and September of 1976. Because the Connecticut State's Attorney's Office assembled its case by September 30, 1977, but did not apply for an arrest warrant until June 12, 1979, the Defendant filed a pretrial motion to dismiss on September 4, 1979 asserting in part that the charges should have been dismissed because of the denial of due process and unreasonable seizure of the person due to the delay in the bringing of the arrest warrant and information. This motion was denied by the trial court. This issue was reserved for appeal, and raised on appeal to the Connecticut Supreme Court in the Defendant's preliminary statement of issues and appeal briefs. The

Connecticut Supreme Court heard said issue but denied that the trial court had been in error. [Instant case appendix, pages 693-695].

At trial, the State was allowed two closing arguments while the Defendant was allowed only one. In her preliminary statement of issues on appeal and in her appeal briefs, the Defendant claimed that she was denied her rights to due process and to a fair trial as a result of this fact. The Connecticut Supreme Court heard said issue but denied that there had been error. [Instant case appendix, page 695].

Because the Defendant did not testify at the trial, she requested a jury instruction to the effect that no inference should derive from her failure to testify. Because the trial court

failed to charge this requested instruction and the statutory instruction on the subject, the Defendant appealed this issue to the Connecticut Supreme Court. She set forth the issue in her preliminary statement of issues and in her appeal briefs. The Connecticut Supreme Court heard said issue and found error, but held that it was harmless error. [Instant case appendix, pages 683-686].

J. ARGUMENT

I. THE DEFENDANT WAS DENIED HER RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND UNDER CONNECTICUT GENERAL STATUTES SECTION 54-84.

Carter v. Kentucky, 450 U.S. 288 (1981), settled the question as to whether a criminal defendant who does not testify is entitled to a no adverse inference jury instruction. Such a defendant has the right to said instruction, upon request, under the privilege against self-incrimination protected by the Fifth and Fourteenth Amendments to the United States Constitution, and if the trial court fails to give said requested instruction, a reversal of the conviction is required. [Id.]. Carter involved the situation where the trial court failed to give a no adverse inference jury instruction in spite of the

defendant's timely and proper request for the same.

The instant case goes one step beyond Carter to the situation where the Defendant requested a no adverse inference instruction, but the instruction made by the trial court proved inadequate to safeguard Mary Carrione's constitutional rights. Nor did it comply with the language required by Connecticut General Statutes §54-84.

Because the Defendant did not testify at her trial, she made a timely and proper request for the following jury instruction by a pleading dated July 16, 1980 [and quoted in instant case appendix, page 684, footnote 1]:

> 1. The accused has not testified in this case.
>
> 2. An accused person is under no obligation to become a

witness in his own behalf. Under our law, an accused person may either testify or not as he sees fit. It is for the State to prove him guilty and no burden rests upon him to prove his innocence.

3. There may be many good and sufficient reasons why the Defendant has not testified (advice of counsel, etc.). No inference or taint should be derived from such failure to testify. [Emphasis added].

Instead, the trial court instructed the jury as follows [and as quoted in instant case appendix, page 684, footnote 2].

> Now, the defendant did not chose to take the stand in her own behalf. I must state to you that this is an absolute constitutional right that she has to chose to take the stand or not. You are to draw no legal impressions from the fact that she did not take the stand and testify. That is a right that a person has. When

> we started this case, during the voir dire or questioning phase of you people as prospective jurors, you did hear it said that the burden of proof was upon the State of Connecticut and that it never shifted; you heard the defendant accused need prove nothing. If it were her choice, and it is her choice in this case not to testify, you are not to penalize her for not testifying and taking advantage of her constitutional right. [Emphasis added].

The trial court's instruction did not meet the requirements of the Fifth and Fourteenth Amendments to the United States Constitution. Nor did it meet the requirements of the mandatory language in Connecticut General Statutes §54-84(b) which states that "...the court shall instruct the jury that they may draw no unfavorable inference from the accused's failure to testify."

The instruction requested by the Defendant is broader than the statutory instruction in that the requested instruction speaks of "no inference" of any type, while the statutory instruction speaks of "no unfavorable inferences." The broader language of the requested instruction had been recognized by the Connecticut Supreme Court in State v. Hicks, 169 Conn. 581, 587 (1975). The trial court, therefore, was left with two choices: to instruct the statutory language, or to instruct the requested language. It was impermissible for the trial court to not instruct either of these, but instead to choose its own instruction which was inadequate to guide the jurors on the legal principles at stake and which was inadequate to protect the Defendant's constitutional rights.

On appeal of this case, the Connecticut Supreme Court agreed that the Defendant was entitled to the protection of the Fifth and Fourteenth Amendments to the United States Constitution and Connecticut General Statutes §54-84. [Instant case appendix, pages 683-686]. The Connecticut Supreme Court furthermore agreed that the trial court committed error in its instruction, but held that such error was harmless because there was "no reasonable possibility that the jury were misled." [Instant case appendix, page 685].

The problem with the Connecticut Supreme Court's conclusion regarding harmless error is that more is required of a jury instruction then it not be misleading; it must accurately instruct laymen jurors in the law, particularly in this area which involves important

Constitutional rights, the exercise of which laymen often do not look upon with favor. Carter v. Kentucky, 450 U.S. 288, 299 (1981), referring to a prior case, expressed this as follows:

> ...'the very purpose' of a jury instruction is to direct the jurors' attention to important legal concepts 'that must not be misunderstood, [emphasis added] such as reasonable doubt and burden of proof,' and emphasized that instruction 'in the meaning of the privilege against compulsory self-incrimination is no different.'

Carter [at 302] went on further to say:

> Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately [emphasis added] instructed in the law. Such instructions are perhaps nowhere more important than in the context of the Fifth Amendment privilege against compulsory self-incrimination, since '[t]oo many, even those

> who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are...guilty of crime...' Ullman v. United States, 350 U.S. 422, 426.

The Connecticut Supreme Court held in the instant case that the trial court's reliance in its instruction on the term "legal impressions" was erroneous:

> An instruction concerning "legal impressions" does not adequately respond to this constitutional entitlement. The substitution of "legal impression" for "legal inference" is erroneous because the term "legal impression," unknown to the law, may well be understood by the jury to encompass not only beliefs that are the product of logical deduction but also less precise mental inclinations arising from psychological or emotional factors. [Instant case appendix, page 685].

The fact that the trial court told the jurors that the Defendant had a Constitutional right not to testify in

her own behalf did not correct the error since a juror could reasonably believe that the Defendant had the right not to testify, but the juror could still infer whatever he or she likes from it. Furthermore, the error was not corrected by the trial court's instruction that the jury was "...not to penalize her for not testifying...". When a juror hears the term "penalize", he or she most likely would think in terms of sentencing only. There is a significant difference between drawing "no inference" as the Defendant requested or the statutory language of "drawing no unfavorable inference", and not to "penalize", as was instructed. The requested instruction says that the failure to testify may not be used in any manner, and the statutory instruc-

tion mandates that the failure to testify not be used in any manner unfavorable to the Defendant. The instructed not "penalize" language, however, is susceptible to an interpretation by the jurors that while they cannot assess a penalty solely because the Defendant did not testify, such fact can be considered by them and used to formulate unfavorable inferences. The jury instruction was, therefore, not only erroneous, but also, that error was not harmless.

It is impermissible to leave the jurors to speculate, as they had to in this case, as to the legal principles by which they were to be guided in this area involving important Constitutional rights. This is particularly true where, as here, laymen often view the exercise of these rights as "a shelter

for wrongdoers" and they "assume that those who invoke it are...guilty of crime...". [Carter at 302]. Every effort must, therefore, be made in this area to protect the accused. No error in this area can be harmless. The Connecticut legislature responded to this delicate area by enacting Connecticut General Statutes §54-84 which reads as follows:

> (a) Any person on trial for crime shall be a competent witness, and at his or her option may testify or refuse to testify upon such trial. The neglect or refusal of an accused party to testify shall not be commented upon by the court or prosecuting official, except as provided in subsection (b) of this section.
>
> (b) Unless the accused requests otherwise, the court shall instruct the jury that they may draw no unfavorable inferences from the accused's failure to testify. In cases

> tried to the court, no unfavorable inferences shall be drawn by the court from the accused's silence. [Emphasis added].

The statutory language was therefore the mandatory minimum language that the Defendant was entitled to in the trial court's jury instruction. The instruction given was confusing and did not meet the minimum statutory standard. This Connecticut statute should even satisfy the lone dissent, Mr. Justice Rehnquist, in Carter, that the people of Connecticut, through the Connecticut legislature, have expressed their wish to be governed in this area by the Fifth and Fourteenth Amendments to the United States Constitution. Therefore, the admitted error in the trial court's instruction was not harmless, and a reversal of the judgment and conviction are required.

II. THE DEFENDANT WAS DENIED HER RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE ONE, SECTION SEVEN OF THE CONNECTICUT CONSTITUTION OF 1965 DUE TO PRE-ARREST DELAY.

There was a delay of more than one and one-half years from the date that the Connecticut State's Attorney's Office obtained the information to procure the arrest warrant and the date that the arrest warrant was issued. [Instant case appendix, pages 693, 694]. Furthermore, as seen in the affidavit in support of the arrest warrant and Information, said arrest warrant resulted from alleged criminal activity taking place more than 33 months earlier. This prearrest delay denied the Defendant's right to due process under the Fourteenth Amendment to the United States Constitution and

the Defendant's right against unreasonable seizure of the person under the Fourth Amendment to the United States Constitution and Article 1, Section 7 of the Connecticut Constitution of 1965.

1) Denial of Due Process

While it is true that "statutes of limitations...provide the primary guarantee against bringing overly stale criminal charges", United States v. Lovasco, 431 U.S. 783, 789, (1977), the statute of limitations does not fully define a defendant's rights, and the due process clause has a role in protecting against oppressive delay. [Id. at 789].

The leading discussion of this issue is found in United States v. Marion, 404 U.S. 307 (1971). Marion also recognized that due process could be violated as a result of pre-arrest delay. In a

concurring opinion, Mr. Justice Douglas, joined by Mr. Justice Brennan and Mr. Justice Marshall, spelled out some of the policy considerations behind this Marion holding:

> The impairment of the ability to defend oneself may become acute because of delays in the pre-indictment stage. Those delays may result in the loss of alibi witnesses, the destruction of material evidence, and the blurring of memories. At least when a person has been accused of a specific crime, he can devote his powers of recall to the events surrounding the alleged occurrences. When there is no formal accusation, however, the State may proceed methodically to build its case while the prospective defendant proceeds to lose his. [Id. at 331].

As explained by the Connecticut Supreme Court in the instant case [Instant case appendix, page 694], the circumstances in which pre-arrest delay

would require dismissal of a criminal charge have not yet been precisely delineated by the United States Supreme Court, but inquiry is required into [1] the reasons for the delay, and [2] the degree of prejudice which has resulted. [Marion at 324].

In reaction to Marion, the Connecticut Supreme Court has held that due process may require dismissal of a prosecution if the delay results in actual prejudice of the defendant's right to a fair trial. [State v. L'Heureux, 166 Conn. 312, 317 (1974)]. Due process is violated unless it is "shown clearly and convincingly that the delay is [1] explainable and not deliberate, and [2] where no undue prejudice attaches to the defendant." [State v. Anonymous (1971-13), 29 Conn. Supp. 193, 194 (1971)].

The Connecticut Supreme Court agreed that in this case there was no satisfactory explanation for the delay of more than one and one-half years from the date that the State's Attorney's Office assembled its case to the date of the arrest warrant. [Instant case appendix, page 694]. As for the reasons for the delay and the intent of the investigators, an accused is in no position to go into the minds of his or her investigators to prove the same. As required by State v. Anonymous (1971-13), supra, once a lengthy delay has been proven by the defendant, the burden should shift to the State to prove that the delay was not deliberate. The judgment and conviction in this case should be reversed because there has been no such showing in this case to explain the reasons for

lengthy delay or the intent behind it. Whatever the intent of the State's Attorney's Office, the Defendant is left with the prejudice to her defense that was the concern of the three concurring Justices in Marion as cited above, namely the loss of alibi witnesses, the destruction of material evidence, and the blurring of memories. In addition to the Defendant's problem of dimmed memories of witnesses, destruction of records and inability to locate records and other evidence, two of the Defendant's most important witnesses died during this time period. As acknowledged by the Connecticut Supreme Court, these were Mary Carrione's son and mother-inlaw, "with whom the Defendant spent much of her time during the period in question and ...[said

mother-in-law's]...severe illness during the period in question serves to explain much of the Defendant's actions", and whereabouts. [Instant case appendix, page 694]. The Defendant has, therefore, certainly been prejudiced by the pre-arrest delay and when coupled with the oppressive length of this delay and the lack of any satisfactory explanation for the delay, it is clear that Mary Carrione's right to due process has been denied. The judgment and conviction must, therefore, be reversed.

2) Unreasonable Seizure of the Person

The Fourth Amendment to the United States Constitution and Article 1, Section 7 of the Connecticut Constitution prohibit unreasonable seizure of the person. Similar to Marion, where a delay between the time of an offense and

the making of an arrest "continues long after all the evidence has been assembled, and becomes a product of mere convenience to the state, a question of unreasonable seizure or lack of a fair trial may arise." [State v. Hodge, 153 Conn. 564, 567-568 (1966); State v. Anonymous (1973-13), 29 Conn. Supp. 193 (1971)]. In order to determine if an unreasonable seizure has occurred, the court must look to "all the circumstances, including the length of the delay, the reason for the delay, prejudice to the Defendant, and a timely presentation of the claim to the trial court." [State v. Hodge, supra, at 568].

Although the Defendant raised this issue in a timely and proper manner at both pretrial and on appeal, the Connecticut Supreme Court failed to

address itself to the unreasonable seizure issue. [Instant case appendix, pages 693-695]. An examination of all the circumstances would show an unreasonable seizure of the person in this case. The length of the delay, more than one and one-half years from the date that the State's Attorney's Office assembled its case to the date of the arrest warrant, and more than thirty-three months from the dates of the acts complained of to the date of the arrest warrant, is clearly oppressive. There was no satisfactory explanation for said lengthy delay, as conceded by the Connecticut Supreme Court. [Instant case appendix, page 694].

Finally, as discussed above, the Defendant has been severely and unduly prejudiced by said delay, and the Defen-

dant made a timely presentation of said claim to the trial court. All the circumstances of this case, therefore, point to an unreasonable and unconstitutional seizure of the person in this case. The judgment and conviction must, therefore, be reversed.

III. THE DEFENDANT WAS DENIED HER RIGHTS TO DUE PROCESS AND TO A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THE STATE WAS ALLOWED TWO CLOSING ARGUMENTS TO THE JURY WHILE THE DEFENDANT WAS ALLOWED ONLY ONE.

At trial the State made two closing agruments to the jury while the Defendant was allowed only one closing argument. This practice is pursuant to Connecticut Practice Book Section 874 (4),(5). This is a rule of the court and not a state statute. Allowing the State to argue both first and last during closing arguments, however, is inherently prejudicial because the jurors naturally accord more weight and dignity to the State's argument as a result. This prejudice, therefore, affects the determination of the ultimate issue of guilt or innocence, and as such, it denies the Defendant's

Fourteenth Amendment rights to due process and to a fair trial. The Connecticut Supreme Court glossed over this issue of first impression without addressing itself to the Constitutional issues. [Instant case appendix, page 695]. This was error and the judgment and conviction should be reversed.

K. CONCLUSION

For all the above reasons, the Petitioner-Defendant prays that this honorable Court issue a writ of certiorari to review the error discussed above.

Respectfully submitted,

Edward R. Karazin, Jr.

APPENDIX A

APPENDIX A

(Excerpt from Connecticut Law Journal
December 21, 1982)

State of Connecticut v. Mary Carrione
(10392)

Speziale, C. J., Peters, Parskey, Shea and Grillo, Js.

Convicted of the crime of larceny in the first degree, the defendant appealed. *Held:*

1. Because the trial court's instruction to the jurors that they were "to draw no legal impressions from the fact that [the defendant] did not take the stand and testify" may have been misunderstood by them, it constituted error; the error was, however, harmless in light of that court's further instruction "not to penalize [the defendant] for not testifying and taking advantage of her constitutional right."

2. The trial court did not err in refusing to instruct the jurors that an adverse inference should be drawn against the state for its failure to produce two prospective witnesses; the defendant failed to demonstrate that she was entitled to that instruction.

3. The defendant's allegation that there had been prosecutorial misconduct during the trial was wholly groundless.

4. The defendant failed to show that she was prejudiced by the one and one-half year delay between the time the state's attorney's office completed its initial investigation of the case and the time she was arrested.

Argued October 12—decision released December 21, 1982

Information charging the defendant with the crime of larceny in the first degree, brought to the Superior Court in the judicial district of Fairfield at Bridgeport and tried to the jury before *Testo, J.*; verdict and judgment of guilty and appeal by the defendant to this court. *No error.*

Edward R. Karazin, Jr., with whom were *Edward B. Morley* and, on the brief, *Leonard A. Schine*, for the appellant (defendant).

Ernest J. Diette, Jr., assistant state's attorney, with whom, on the brief, were *Donald A. Browne*, state's attorney, and *Stephen H. Solomson*, assistant state's attorney, for the appellee (state).

Shea, J. A jury found the defendant guilty of larceny in the first degree in violation of General Statutes § 53a-122 (a) (2) and § 53a-119. She has appealed from the judgment of conviction raising numerous claims of error, many of which lack substantial merit. The issues which warrant full discussion are (1) whether the trial court adequately instructed the jury to draw no inference from the failure of the defendant to testify; (2) whether the court should have charged that an unfavorable inference could be drawn against the state from the failure to produce certain witnesses; (3) whether there was misconduct on the part of the prosecutor in asking questions which previous rul-

ings of the trial court were intended to exclude; and (4) whether the extended delay between the criminal act alleged in the information and the institution of the prosecution required a dismissal. We find no error.

The larceny of which the defendant was convicted involved a scheme in which she induced several of her relatives and friends to give her substantial sums of money to be invested in undisclosed ventures, which she represented would provide extremely high returns in a few months. In one instance the defendant paid to a victim $1000 as the income for a period of less than three months upon a $3000 investment. These marvelous returns, of course, induced that victim and others like her to invest additional funds with the defendant, most of which were never accounted for and disappeared. No further review of the evidence is necessary because the defendant conceded during oral argument that if the jury believed the testimony of the witnesses for the state, particularly that of Louis Argenio, they might reasonably have come to their conclusion of guilt. We find no merit, therefore, in her claim that the evidence was insufficient to support the verdict.

I

In *State* v. *Burke*, 182 Conn. 330, 438 A.2d 93 (1980), this court held that it was plain error for a trial judge not to comply with the mandate of General Statutes § 54-84 (b) to "instruct the jury that they may draw no unfavorable inferences from the accused's failure to testify," unless the accused requests otherwise. Id., 333. More recently the Supreme Court of the United States has held that a defendant has a constitutional right to such an

instruction when he so requests. *Carter* v. *Kentucky*, 450 U.S. 288, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981).

The defendant, who filed a request for an instruction upon the effect of her failure to testify,[1] claims that the language used by the court to instruct the jury on this subject deviated substantially from that required.[2] The court charged that the jurors were "to draw no legal impressions from the fact that [the defendant] did not take the stand and testify" and they were "not to penalize her for not testifying and taking advantage of her constitutional right."

The defendant's right to an instruction that no unfavorable inference shall be drawn from her failure to testify, because the defendant requested such a charge, rests upon the constitution and not merely

[1] The defendant requested the following charge: "1. The accused has not testified in this case. 2. An accused person is under no obligation to become a witness in his own behalf. Under our law, an accused person may either testify or not as he sees fit. It is for the State to prove him guilty and no burden rests upon him to prove his innocence. 3. There may be many good and sufficient reasons why the Defendant has not testified (advice of counsel, etc). *No inference or taint should be derived from such failure to testify.*" (Emphasis added.)

[2] The portion of the charge dealing with the failure of the defendant to testify was as follows:

"Now, the defendant did not choose to take the stand in her own behalf. I must state to you that this is an absolute constitutional right that she has to choose to take the stand or not. You are to *draw no legal impressions* from the fact that she did not take the stand and testify. That is a right that a person has.

"When we started this case, during the voir dire or questioning phase of you people as prospective jurors, you did hear it said that the burden of proof was upon the State of Connecticut and that it never shifted; you heard the defendant accused need prove nothing. If it were her choice, and it is her choice in this case not to testify, you are not to *penalize* her for not testifying and taking advantage of her constitutional right." (Emphasis added.)

upon our statute. *Carter* v. *Kentucky*, supra, 305. An instruction concerning "legal impressions" does not adequately respond to this constitutional entitlement. The substitution of "legal impression" for "legal inference" is erroneous because the term "legal impression," unknown to the law, may well be understood by the jury to encompass not only beliefs that are the product of logical deduction but also less precise mental inclinations arising from psychological or emotional factors. Although the defendant's request to charge asked generally that "no inference or taint" be drawn, and did not expressly invoke the language of § 54-84 (b), that request did not invite the court to substitute an instruction about "legal impressions" for an instruction on "legal inferences."[1]

We conclude nonetheless that this error does not warrant reversal of the defendant's conviction. An erroneous instruction, even of constitutional dimension, is harmless if, viewed in the context of the charge as a whole, there is no reasonable possibility that the jury were misled. *State* v. *Hines*, 187 Conn. 199, 209, 445 A.2d 314 (1982). In this case, after the unfortunate reference to "legal impressions," the court went on to explain, concretely and unambiguously, the defendant's constitutional right not to testify in her own behalf. Emphasizing that the choice about testifying belonged to the defendant, the court expressly instructed the jury "not to penalize her for not testifying and taking advantage

[1] We note that when the instructions were given, the defendant took no exception in this regard. We have, however, held that failure to except to the charge required by General Statutes § 54-84 (b) does not preclude review on appeal. *State* v. *Burke*, 182 Conn. 330, 331-32, 438 A.2d 93 (1980). Neither is an exception necessary if the court fails to charge the substance of the requested charge. Practice Book § 854.

of her constitutional right." In substance, this instruction conveyed to the jury precisely that which the customary instruction about "legal inferences" is intended to communicate. It served, therefore, to make the earlier use of erroneous language harmless.

II

The defendant claims that she was entitled to a charge that an unfavorable inference should be drawn against the state for its failure to furnish the testimony of two prospective witnesses. "The failure of a party to produce a witness who is within his power to produce and who would naturally have been produced by him, permits the inference that the evidence of the witness would be unfavorable to the party's cause." *Ezzo* v. *Geremiah*, 107 Conn. 670, 677, 142 A. 461 (1928). "There are two requirements for the operation of the rule: The witness must be available, and he must be a witness whom the party would naturally produce." *Secondino* v. *New Haven Gas Co.*, 147 Conn. 672, 675, 165 A.2d 598 (1960).

The defendant's request to charge[4] did not specify which persons the state should have called as witnesses except by a general reference to the information. In excepting to the charge, however, she did mention the failure of the prosecutor "to call two of the named complainants in the information . . . ." On appeal the defendant claims that she was entitled to receive a missing witness charge

[4]The defendant requested the following charge: "The failure of the State to call witnesses who were within its power to produce and were named in the State's information, and who had direct contact with the Defendant, gives the Jury the right to infer that the testimony of such witnesses would be unfavorable to the State's theory of the case." This requested charge was omitted from the printed record but was included in the defendant's brief.

with respect to Debbie Belward and Carmella Gilberti, two of the eight persons named in the information as victims of larceny.

Debbie Belward was the wife of William Belward, who was also named in the information as a victim and who did testify at the trial. His testimony indicated that the source of the funds which he gave the defendant was his own bank account. Although there is some ambiguity in his use of the first person plural at some points in his testimony in referring to the ownership of the "investment," he did testify on cross-examination that it belonged to him exclusively. At some point in the transaction it appears that his investment was combined with that of his mother-in-law, Gloria Cook, who also testified as a victim concerning funds which she had given to the defendant. It appears that his wife, Debbie Belward, was present when the initial conversation with the defendant about investing the money took place, but she did not observe the funds being delivered to the defendant. Nor does it appear that she attended or participated in any of the subsequent meetings with the defendant related to this investment. The affidavit attached to the bench warrant indicates that the police incorrectly assumed that the funds for the investment made by William Belward came from a bank account which he and his wife owned jointly. This circumstance may explain Debbie Belward's being named as a victim in the information, which is the sole basis for the defendant's claim that she was a witness whom the state would naturally have produced.

The other person named as a victim in the information who did not testify, Carmella Gilberti, was the mother of Natalie Gilberti, who resided with her and did appear at the trial as a witness. Natalie

Gilberti testified that she gave the defendant $3000 of her own funds and $3000 from her mother's savings account to be treated as one investment. Her mother and her sister, the witness Gloria Cook, were present at this meeting with the defendant. Carmella Gilberti may have been in the house, but may not have been in the room, about two months later when the defendant returned $1000 in bills as a return on the investment made by her and her daughter. The investment of this sum with the defendant together with an additional $2000 in behalf of Carmella Gilberti was handled entirely by Natalie Gilberti.

Our review of the transcript indicates that the only significant events of which Debbie Belward and Carmella Gilberti may have had first hand knowledge were the initial conversations between the defendant and the witness William Belward in one instance and the witness Natalie Gilberti in the other. The witness Gloria Cook also testified briefly about both of these occasions. It appears that the testimony of these witnesses would have been cumulative at best. The fact that one is named as a larceny victim does not necessarily establish that he would be able to furnish evidence of sufficient importance at a trial to warrant an inference against the state for failure to produce him. "To charge the jury on the rule, the party claiming the benefit of the rule must show that he is entitled to it." *Doran* v. *Wolk*, 170 Conn. 226, 229, 365 A.2d 1190 (1976). "A possible witness whose testimony is for any reason comparatively unimportant, cumulative or inferior to what has been offered should be dispensed with on the general ground of expense and inconvenience, without anticipation that an inference may be invoked." *State* v. *Brown*, 169

Conn. 692, 705, 364 A.2d 186 (1975); 2 Wigmore, Evidence (3d Ed.) § 287. We conclude that the defendant has not demonstrated that she was entitled to the requested charge.

III

The defendant has charged the state with prosecutorial misconduct by virtue of its questioning several witnesses about transactions with the defendant which occurred after the terminal date[4] alleged in the substitute information. The trial court excluded such inquiries as going beyond the scope of the charge and the defendant claims no error in these rulings. On appeal the defendant claims that, despite the favorable rulings on her objections, the questions asked by the prosecutor, even if they went unanswered, were designed to bring before the jury criminal acts other than those charged and that she was unduly prejudiced as a result. In essence, the defendant now seeks the mistrial for which she made no motion in the trial court. Implicitly she claims error in the failure of the court to declare a mistrial sua sponte. Such action, in the absence of the defendant's consent or of manifest necessity, would present a serious question of whether the defendant would then be entitled to an acquittal by virtue of a double jeopardy claim. See *Harris* v. *Young*, 607 F.2d 1081, 1086, (4th Cir. 1979), cert. denied sub nom., *Mitchell* v. *Harris*, 444 U.S. 1025, 100 S. Ct. 688, 62 L. Ed. 2d 659 (1980); *State* v. *Stankevicius*, 3 Conn. Cir. Ct. 580, 584–85, 222 A.2d 356 (1966).

"The supreme court shall not be bound to consider a claim unless it was distinctly raised at the

[4] The substitute information alleged that the larceny was committed in Norwalk and Stamford "between July of 1975 and September of 1976."

trial or arose subsequent to the trial . . . ." Practice Book § 3063. The defendant contends, however, that the conduct of the prosecutor so seriously prejudiced her that she was deprived of a fair trial in violation of her right to due process of law. Since prosecutorial misconduct may implicate due process; see *Smith* v. *Phillips*, U.S. , 102 S. Ct. 940, 947, 71 L. Ed. 2d 78 (1982); we are obliged to review the trial court proceedings to determine whether there is any merit to such a claim. *State* v. *Evans*, 165 Conn. 61, 70, 327 A.2d 576 (1973).

We have carefully examined the several transcript references in the defendant's brief relied upon to support this claim as we are wont to do where an accusation of prosecutorial misconduct is made. See *State* v. *Cosgrove*, 186 Conn. 476, 484–89, 442 A.2d 1320 (1982). Before testimony began the state was permitted to amend the original information, which alleged the commission of the crime of larceny in the first degree between July 1975 and August 1976, by changing the latter date to September 1976. The witness Louis Argenio testified that he had, starting on December 2, 1975, given sums of money to his brother to be invested with the defendant which totalled $32,000 by August 16, 1976. He was then asked about any later investments and he replied that on September 9, 1976 he had given the defendant another $25,000 when she was at the home of his brother. After the witness identified the defendant in the courtroom, the defendant then moved to strike the testimony concerning the September incident because it related to the commission of another crime outside the dates set forth in the amended information. The court granted the motion and instructed the jury

to disregard this testimony. The state requested argument on the ruling and the jury were excused. The state argued that evidence of other transactions with the defendant later than the dates given in the information should be permitted because these events had probative value in establishing the earlier crimes. See *State* v. *Nardini*, 187 Conn. 513, 519, 447 A.2d 396 (1982). The trial court persisted in the original ruling excluding such testimony on the ground that it would be confusing to the jury and unduly prejudicial because of similarity of the uncharged acts to those included within the time frame of the information. The ruling, however, was limited expressly to the evidence of the delivery of money to the defendant on September 9, 1976.

Another witness, Gloria Cook, in response to a question of the prosecutor which was clearly confined to the period within the information, began to volunteer some testimony about "[a]fter September," but was cut-off immediately by the defendant's objections, which the court sustained. William Belward testified that in September or October of 1976 the defendant had asked him for the additional sum of $27,000. The trial court granted the motion of the defendant to strike this testimony. The state requested that the jury be excused and, after they left the courtroom, offered to prove that the defendant requested the $27,000 in order to pay off three detectives who had discovered the missing money and that the defendant had advanced this and other excuses for her inability to return the invested funds. The court refused to change its ruling which excluded such testimony.

An additional instance of prejudice cited by the defendant relates to the testimony of Natalie Gilberti. Her response to a question asked by the

court about reinvesting a $2000 interest payment with the defendant prior to September 1976 was that "it was not invested prior," leaving the implication that there was such a transaction with the defendant after that date. She also testified about some checks given by the defendant as repayments to her in December 1976, which the court excluded for lack of proper authentication.

It is apparent from this review that the allegation of prosecutorial misconduct is wholly groundless. Indeed, the prosecutor seems to have exhibited more than the ordinary degree of care in requesting the jury to be excused when questions of evidence were to be argued and in framing his questions to comply with the court's ruling. The responses of some of the witnesses which may have transgressed the court's ruling do not appear to have been solicited by the prosecutor, some of them having been occasioned by questions of the trial judge. Furthermore, the testimony about later transactions with the defendant might well have been admitted by the trial court to show a common scheme to defraud the victims by inducing them to reinvest the returns she paid them along with additional sums of money. *State* v. *Nardini*, supra, 519. This evidence was highly relevant to prove the existence of a larcenous intent at the time when she received the initial investments from these victims which fell within the dates alleged in the information. The ruling of the trial court seems to have been intended to exclude only evidence of additional investments by these victims rather than the reinvestments of the interest payments on their original investments. This exercise of discretion rested well within the authority of the trial court to restrict the use of cumulative evidence and to balance its probative

value against its prejudicial tendency. Id., 520; *State* v. *Falby*, 187 Conn. 6, 23, 444 A.2d 213 (1982). Inasmuch as we would not be inclined to find error if the trial court had exercised its discretion differently and had allowed the evidence complained of to come into the case, we can hardly find undue prejudice in the unsolicited responses of a few witnesses which went beyond the scope of its discretionary ruling. A fortiori, we find no such degree of prejudice as would amount to the deprivation of a fair trial. See *State* v. *Evans*, 165 Conn. 61, 70–73, 327 A.2d 576 (1973).

IV

The defendant claims that the delay of one and one-half years from completion of the initial investigation of the case by the office of the state's attorney until the arrest was unreasonable and required dismissal of the information. The trial court considered this ground for dismissal, but found that the delay was not purposeful and that it was probably necessary because of the complexity of the case. It also concluded that the defendant had failed to demonstrate any actual prejudice resulting from the delay.

The sixth amendment guaranty of a speedy trial does not apply to the time which elapses before a criminal proceeding is commenced by arrest or accusation. *United States* v. *MacDonald*, U.S. , 102 S. Ct. 1497, 1501, 71 L. Ed. 2d 696 (1982); *United States* v. *Marion*, 404 U.S. 307, 313, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971); see *State* v. *L'Heureux*, 166 Conn. 312, 318, 348 A.2d 578 (1974). The statutes of limitation are ordinarily the only protection afforded to a defendant against the institution of stale criminal charges. *United States* v. *Marion*, supra, 322. The due process clause, however,

becomes implicated where substantial prejudice from such delay has resulted and the delay was for the purpose of gaining a tactical advantage over an accused. Id., 324. Delay occasioned by a desire to make a thorough investigation before commencing a prosecution has not been regarded as tactically motivated and has been approved. *United States* v. *Lovasco*, 431 U.S. 783, 795, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977). The circumstances in which preaccusation delay would necessitate dismissal of a charge have not been precisely delineated, but inquiry is required into the reasons for the delay and the degree of prejudice which has resulted. Id., 796–97; *United States* v. *Marion*, supra, 324.

Although there is no satisfactory explanation for the delay of more than one and one-half years from the date of the information obtained by the police until the arrest, there is no suggestion of any attempt by the state to gain a tactical advantage. The inspector who first handled this investigation of the complaints of seventeen victims retired a little more than one year after the first complaints about the defendant were received. Another inspector completed the investigation and the prosecution was instituted about six months later.

The defendant has failed to show that any actual prejudice has been caused by the delay. In her brief she relies upon the death of two witnesses, her son and her mother-in-law, "with whom the defendant spent much of her time during the period in question and whose severe illness during the period in question serves to explain much of the defendant's actions." We can only conjecture how the illness of these possible witnesses could constitute a defense to the criminal charges against the defendant. There is no indication in the record that they

were present when any of the transactions with the larceny victims took place. We agree with the conclusion of the trial court that the defendant has failed to demonstrate any actual prejudice from the delay and that her motion to dismiss should be denied.

V

The remainder of the errors claimed by the defendant may be treated briefly.

The numerous rulings on evidence which are challenged were well within the discretionary authority of a trial judge to determine the relevance of the evidence and involved no prejudice to the defendant. *State* v. *Periere,* 186 Conn. 599, 607–608, 442 A.2d 1345 (1982).

The tardy disclosure of letters written by one of the state's witnesses to the Stamford chief of police and to the governor was not deliberate. The prosecutor made them known as soon as he discovered them in the police file. The defendant chose not to avail herself of the opportunity to recall the witness for further cross-examination regarding the contents of the letters. See *State* v. *Cosgrove,* 186 Conn. 476, 488, 442 A.2d 1320 (1982). Another witness, who testified that she had given statements to the police which had not been produced, was referring to her oral conversations with the police. See Practice Book §§ 748, 752. The prosecutor, who had requested the police to furnish any records or notes of the interviews, appears to have done all that was reasonably possible in this situation.

The right of the state to a closing argument is provided by the rules of practice. Practice Book § 874(4). No authority is cited by the defendant to support her claim that this practice deprived her of a fair trial.

The trial court properly denied the defendant's request to charge the jury that if the victims "gave said money to the defendant by their own consent, then you must find the defendant not guilty." Such an instruction would have been quite misleading in this case where the charge of larceny is based upon fraud or embezzlement. See General Statutes § 53a-119 (1) (2) and (3). With respect to another error claimed in the charge, which was not even made the subject of an exception, the court was correct in using the disjunctive in the phrase "intent to deprive another of property or to appropriate the same." General Statutes § 53a-119. The use of the conjunctive in the information was in conformance with approved practice and did not impose on the state any greater burden than that required by the statute for a conviction. 41 Am. Jur. 2d, Indictments and Informations § 214. Another deficiency claimed in the instructions concerning innocent participation in a crime was corrected by the trial court to the apparent satisfaction of the defendant, since no further exception was taken to the additional instruction.

It does appear that when some checks had been admitted as exhibits the court had excluded the bank markings on the reverse side of them for lack of proper authentication. The checks were handed to the jury along with other exhibits for use in their deliberations with the excluded markings uncovered. Counsel for the defendant and the state inspected these documents before they were handed to the jury. We are not convinced that the possibility that the jury may have seen those bank markings on the checks was sufficiently prejudicial as to warrant a new trial.

We agree with the rulings of the trial court denying the defendant's motions to dismiss because of the failure to include exculpatory information in the affidavit supporting the arrest warrant application. The affidavit adequately supported a finding of probable cause.

There is no error.

In this opinion the other judges concurred.